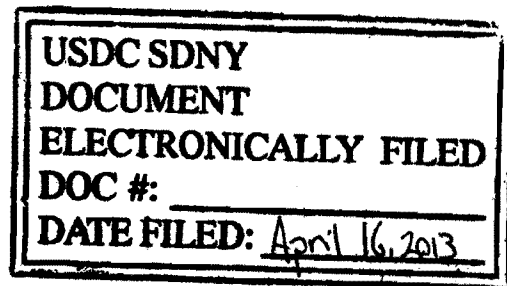


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



In re AUSTIN CAPITAL MANAGEMENT,
LTD, SECURITIES & EMPLOYEE
RETIREMENT INCOME SECURITY ACT
(ERISA) LITIGATION

09 M.D. 2075

OPINION

On December 21, 2012, the court issued an opinion and order dismissing plaintiff's complaint. Among the claims in that complaint were several state-law claims which were dismissed pursuant to the Securities Litigation Uniform Standards Act ("SLUSA"), 15 U.S.C. §§ 78bb(f), 77p(b). The plain language of that statute bars any covered class action that alleges misrepresentation in connection with the sale of a covered security.

Nonetheless, the court did not hold, as plaintiff contends, that SLUSA bars any "**any** action that includes **any** allegations of misrepresentations." What the court held is what it wrote. "Courts in this circuit dismiss state-law claims like plaintiffs' claims for negligence, breach of fiduciary duty, etc. when those claims are included in a broader complaint that substantially revolves around allegations of misrepresentation.... [T]he 'in connection with' requirement is to be construed expansively to cover any conduct within the same scheme as the sale (whether actual or merely purported) of securities."

The court is aware that the proper scope of the “in connection with” requirement is a question currently before the Supreme Court of the United States. *Proskauer Rose LLP v. Troice*, – U.S. –, 2013 WL 203550 (Jan. 18, 2013). Having not been decided, the court’s future decision in *Proskauer Rose* certainly cannot be considered to have been “controlling authority” for the purposes of reconsidering the court’s December 21, 2012 opinion. There would therefore be little sense in doing as plaintiff suggests and staying the court’s determination of this motion for reconsideration until the Supreme Court issues a ruling in that case. Presumably, however, future motions directed at plaintiff’s amended complaint are likely to be governed by whatever rule, if any, is announced in *Proskauer Rose*.

The entirety of plaintiff’s complaint was dismissed with leave to re-plead.

Accordingly, plaintiff’s motion for reconsideration is denied.

Dated: New York, New York
April 16, 2013

A handwritten signature in black ink, reading "Thomas P. Griesa". The signature is written in a cursive, flowing style. Below the signature is a horizontal line.

Thomas P. Griesa
U.S. District Judge